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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CARLOS DIAZ-MATOS,

Petitioner,

v.

THE PEOPLE OF PUERTO RICO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court for the Commonwealth of Puerto Rico

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the People of Puerto Rico, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the unpublished judgment issued by the Supreme Court of the Commonwealth of Puerto Rico in this case.

STATEMENT OF THE CASE

Petitioner, Carlos Diaz Matos, was indicted in the Superior Court of Puerto Rico, San Juan Part, for the following offenses: Sec. 2.8 of the Domestic Violence Act,[1]

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[1] Act No. 54 of August 15, 1989 (8 L.P.R.A. sec. 628).

breach of the peace,[2] use of violence and intimidation against public authority,[3] and aggravated battery. Said events took place at the Hato Rey East Police Station on August 17, 1991.

Petitioner was tried by jury, but the presiding judge peremptorily acquitted the defendant of the Domestic Violence charge. The jury acquitted him of the charges of using violence and intimidation against public authority and aggravated battery, but rendered a guilty verdict on the breach of the peace offense. He was sentenced to pay a $250.00 fine plus costs or to serve one day in jail for every $5.00 left unpaid.

On May 7, 1994, petitioner filed an appeal to the Puerto Rico Supreme Court alleging that the evidence brought against him was not sufficient at law to establish his guilt beyond a reasonable doubt. Although his contentions about the unconstitutionality of the statute and flawed jury instructions were not presented before the trial court, petitioner also alleged that Section 260 of the Puerto Rico Penal Code suffers serious constitutional problems and questioned the instructions given to the jury.

On November 10, 1995 the Puerto Rico Supreme Court affirmed the judgment. After reviewing the evidence presented by the prosecution,[4] the court held that it covered

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[2] Puerto Rico Penal Code Sec. 260 (33 L.P.R.A. sec. 4521).

[3] Puerto Rico Penal Code Sec. 256 (33 L.P.R.A. sec. 4491).

[4] The facts as summarized in the judgment of the Supreme Court of the Commonwealth of Puerto Rico represent a more complete version of the evidence presented against the petitioner. App. pages 2-4.

all of the elements of the offense charged and linked the defendant to the events of which he was accused.

Regarding the constitutional issues raised by the petitioner, the court held that discussion of the assigned errors was not warranted for the first time on appeal because they did not infringe on appellant's fundamental rights. Citing, *People v. Caro González*, 110 D.P.R. 518, 10 Official Translations 667 (1980) the court asserted that it was legitimate to intervene with the expression or language of a citizen were there exists an authentic interest in safeguarding the public order. The court concluded "that there is no hermeneutic consideration whatsoever that prevents an interpretation to the effect that the statute in question prohibits precisely the type of language used by Díaz Matos." (App. p.9).

As to the jury instructions the court noted that the trial judge, in more than one occasion, gave the parties the opportunity to object or add to those instructions. The defense, for the record, not only made no objections but agreed with the instructions given. Consequently, the court concluded that "a careful and unbiased analysis of the instructions convinces us that said instructions substantially conform to law insofar as they explained to the jury all the legal aspects pertinent to the case." App. 12.

REASONS FOR DENYING THE PETITION

THE COURT NEED NOT REVIEW THE QUESTIONS PRESENTED, BECAUSE THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO HAS CLEARLY LIMITED SECTION 260 OF THE PENAL CODE TO THE USE OF FIGHTING WORDS.

To argue his case, petitioner conveniently translates the Spanish word "cabrón" as "son of a bitch". This translation is inaccurate. The word as used in Puerto Rico means a lot more. To comprehend the real meaning of the word it is necessary to understand the culture and particular idiosyncrasy of the people of Puerto Rico. Puerto Ricans have a strong Spanish tradition, which has established strong roles for males in society.

In Puerto Rico, the word "cabrón" is a very offensive insult, capable of provoking a violent reaction. Every person, police officer or not, is aware of its meaning and implications. It is the worst insult that can be uttered against a Puerto Rican male since the generally accepted meaning of the word is "he who consents to his wife's adultery".[5] It is considered an attack upon a man's virility or manhood since it implies that his wife is having an affair, of which he knows but does nothing about it.

The word "cabrón", however, is not a prohibited word as alleged by petitioner. It can be lawfully used in different

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[5] Diccionario de la Lengua Española, (Dictionary of the Spanish Language), Real Academia Española, Editorial Espasa-Calpe, Madrid, page 260.

situations, as in literature[6] or casually. As with any other fighting word, only when it is used under certain given circumstances, does it constitute the conduct punishable under Section 260. First, the word must be uttered as a direct insult to a person who was previously at peace. *People v. de León Martínez*, Opinion dated February 13,(1993),93 J.T.S. 20.[7] It is essential that the vulgar or offensive language be heard by the person to whom it is addressed. *People v. Medina*, 58 P.R.R. 924 (1941). Article 2 Section 8 of the Constitution of the Commonwealth of Puerto Rico establishes that "every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life". This Section guarantees the protection of public and individual peace.[8] *People v. Arcelay Galán*, 102 D.R.R. 409, 2 Official Translation 512 (1974). Public peace means the sense of serenity and tranquility, so necessary to one's comfort that every person feels under the protection of law; a breach of peace is an invasion of the protection that the law thus affords. *People v. Figueroa Navarro*, 104 D.R.R. 721, 4 Official Translations 1016 (1976).

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[6] See, García Márquez, Gabriel, *One Hundred Years of Solitude*.

[7] Unfortunately, this opinion has not yet been published in the English language. An expedited translation of the opinion has been requested from the Office of Translations of the Supreme Court of Puerto Rico. As soon as the translation becomes available, it will be forwarded to this Honorable Court.

[8] For a brief history of this section of the Constitution see, *Commonwealth of Puerto Rico v. Hermandad de Empleados*, 104 D.P.R. 436, 4 Official Translation 605 (1975).

The present Section 260 of the Penal Code derived from Sections 368 and 370 of the Penal Code of 1937,[9] and is divided in three modalities. Subsection A refers to the malicious and voluntary disturbance of "the peace and quiet of any individual or neighborhood, by loud and unusual noises, tumultuous,[10] or offensive conduct or threats, insults, fights, challenges, and provocations".Most of the acts proscribed in section 260, such as loud and unusual noises, threats or fights need no further commentary. Others have been the object of interpretation by the Supreme Court of the Commonwealth of Puerto Rico.

In *People v. Ways*, 29 P.R.R. 311 (1921), the term "offensive" was defined as "anything that causes displeasure, gives pain or unpleasant sensations".[11] The term "insults" (then traducing) was defined as "to misrepresent, hold up or expose to ridicule or calumny; defame; calumniate, vilify". Also "... to expose wrongfully to contempt or shame...". "Insult or opprobrium cast at a person. Actions or circumstances which causes afford or disgrace" and "to speak evilly of a person or thing classifying him or it as vicious or disgraceful".[12]

Early interpretation of the section suggested that the act must be done in public in order to constitute the offense. In *People v. Kortright, 70* P.R.R. 376 (1949), the court

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[9] 33 L.P.R.A. secs. 1439 and 1441.

[10] A tumultuous action, as used in this section is a breach of the peace within the statutory definition of riot. *People v. Pacheco*, 48 P.R.R. 584 (1935).

[11] *Id.* at page 314

[12] *Id.* at pages 315-316.

concluded that, under the circumstances, words uttered even in a loud tone and a little excitedly were insufficient to consider that the offense was committed. In *People v. Ruiz,* 29 P.R.R. 68 (1921), where a vulgar epithet was uttered against a judge, the court concluded that the insult was not offered in a loud and boisterous manner. See, also, *People v. Pillot,* 29 P.R.R. 826 (1921), where the court concluded that the complaint did not charge the offense of breach of the peace by vituperations and threats.

In *Ramos v. District Court,* 73 P.R.R. 399 (1952), the court extended the scope of this statute, so that the act of peeping through a window at the time a husband and wife were about to go to bed was an offensive conduct within the phrase disturbing the peace or quiet of a person or several persons.

Later, in *Vizcarra Castellón v. People,* 92 P.R.R. 150 (1965), the Court concluded that the use of vile, abusive and indecent language over the telephone constituted a breach of the peace. It was not necessary that the act be seen or the words heard by more than one person in addition to those directly affected, or that it cause a disorder in a sizable segment of the community.

In *People v. Caro González, supra,* the Supreme Court of the Commonwealth of Puerto Rico finally decided a question it had left unanswered in *People v. Matos,* 43 P.R.R. 393 (1932), to wit, whether a police officer is protected by section 260(a)of the Penal Code. The court analyzed its previous decisions and concluded that "neither its text [Section 260] nor its case history contains discernible criteria to determine the point where the conduct or offensive or

insulting language uttered by a person to another is near to or will cause an event which in effect, will disturb the peace and public order."[13] The court took into consideration the latest cases decided by this Court on the First Amendment of the United States Constitution, which guarantees that protected expression be not punished.

Adopting the doctrines set forth in *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942); *Cohen v. California,* 403 U.S. 15 (1971); *Gooding v. Wilson,* 405 U.S. 518 (1972) and *Lewis v. City of New Orleans,* 408 U.S. 913 (1972), the court concluded that:

> We resolve that the application of modality (a) of art. 260 of the Penal Code, exactly as it has been construed, is *not* totally excluded when the subject is a policeman. However, among all the circumstances which should be considered of the crucial determination of whether the words constitute "fighting words," attention must be paid to the fact that one should always expect that a policeman exercise a greater degree of control over his emotions, showing a high degree of tolerance when faced with possible insults that may be addressed to him in diverse situations.[14]

Therefore, the Court sanctioned the conduct and language addressed by defendant to the police officer, adding that "the

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[13] *Id.* at page 676

[14] *Id.* at pages 681-682

words uttered within the meaning attributed to them by the general idiosyncrasy of our people, are by their own nature, rather than annoying, offensive, and irritating, capable of provoking a violent reaction (fighting) and consequently a breach of the peace."[15]

In conclusion, section 260 of the Penal Code does not regulate spoken words, only certain types of conduct. "It is a better analysis to regard fighting words as within the ambit of action rather that speech because there is no intellectual content to be conveyed to the listener, but merely a provocation, emotional message intended and likely to incite an *immediate* violent response".[16] Thus, the Supreme Court of Puerto Rico has consistently incorporated to our statute the interpretation of this Court regarding the scope of the constitutional right of freedom of expression.

In *Chaplinsky v. New Hampshire, supra*, this Court established that the state may intervene with the citizen's utterance or language when there is a legitimate interest or purpose of safeguarding the public order. When fighting words are involved, the interest of the state is predominant. Fighting words were defined as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace". These are not constitutionally protected because their "slight social value as a step to truth that any

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[15] *Id.*

[16] Rotunda & Novak, *Treatise on Constitutional Law: Substance and Procedure*, sec. 20.37 (2d ed. 1992).

benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[17]

The decisions that followed *Chaplinsky* reflected a desire of the Court to limit the broad implications of the outlined doctrine and recognized the potential social value in statements that might come under the initial definition of fighting words. *Terminiello v. Chicago,* 337 U.S. 1(1949); *Feiner v. New York,* 340 U.S. 315, (1951); *Edwards v. South Carolina,* 372 U.S. 229 (1963). In these cases, contrary to *Chaplinsky*, the insults were not face-to-face confrontations, but harangues not focused on the audience, nor was the audience compelled to listen to them. This Court emphasized that even provocative speech is protected against censorship unless the state can prove that such words will cause an immediate disruption.

Cohen v. California, supra, provides an important affirmation for this distinction. Even though an offensive expletive was used, this does not detract from the protection afforded to speech. The offensive word was not a direct personal insult specifically directed to a particular person nor was the State exercising its police power "to prevent a speaker from intentionally provoking a given group to a hostile reaction".[18] In *Hess v. Indiana*, 414 U.S. 105 (1973), the Court reversed the conviction because the words used were not directed to a particular person or group, and there was no evidence of an imminent violent reaction.

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[17] *Id.* at 572

[18] 403 U.S. at 20

In *Gooding v. Wilson*, *supra*, this Honorable Court avoided overruling *Chaplinsky* by employing the vagueness and overbreadth standard to overturn the statute. After conducting its own examination of the state case law, this Court held that the state decisions did not limit the statute "to words that have a direct tendency to cause acts of violence by the person to whom individually, the remark is addressed."[19] In *Lewis v. New Orleans, supra,* the statute was vague and overbroad.[20] Unlike section 260, the overturned statute prohibited the use of offensive or opprobrious language toward a police officer while on duty. Any word addressed to a police officer in an offensive or opprobrious manner constituted an offense. Thus the statute was clearly overbroad.

The most important case regarding fighting words is *R.A.V. vs. City of St. Paul*, 505 U. S. ___, 120 L.ed 2d 305,(1992).[21] This Court held that a state can not make mere words a crime because they are politically incorrect, or because the state wishes to drive certain ideas from the marketplace. Even when prohibiting "fighting words", the state may not engage in an effort to suppress unpopular or

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[19] *Id.* at 524

[20] The statute in question read as follows:
"It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to used obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty".

[21] See, also; *44 Liquormart Inc. v. Rhode Island*, n. 20 - No. 94-1140; 64 USLW 4313 (May 13, 1996).

even offensive ideas. The state may forbid "fighting words", as long as it does so in a viewpoint-neutral manner.

Petitioner cites *Negrón v. Orozco Rivera*, 113 D.P.R. 712, 13 Official Translations 921 (1983), to argue that use of the word "cabrón" had no relation to the death of a person. The incident, as stated in notes 1 and 3 of the opinion of the court, started when police officer Orozco-Rivera and Negrón had an argument on an Aguas Buenas road. Both used obscene language and Negrón called Orozco-Rivera "cabrón". Moments later Negrón went to the Police Station to lodge a complaint and at that instant Orozco-Rivera also arrived expressing that he had a problem with an individual that called him "cabrón". He was sent to the report room while Negrón was to wait outside with officer Pérez. When Orozco called Pérez, Negrón took advantage of the opportunity and called Orozco a bully. Orozco, then, using his revolver fired several times at Negrón. Obviously, the events that culminated in the death of Negrón started when he called Orozco-Rivera a "cabrón". This is contrary to petitioner's assertion that the police officer shot the person that called him "cabrón" several days later. The events took place the same day and were closely related.

In *People v. Ortíz González*, 111 D.P.R. 408, 11 Official Translations 503 (1981), the Supreme Court of Puerto Rico stated that the fact the victim, a feeble alcoholic, insulted the murderer by calling him a "cabrón" several days before the incident that culminated in the tragedy, cannot be considered a provocation capable of arousing heat of passion to justify a manslaughter verdict. The court stated that the "concepts of dignity and honor of a person is not affected by mere insults

from a feeble alcoholic".[22] This holding is not a departure from *Caro González, supra*. It reaffirms that the word "cabrón" is a fighting word, but in this particular case it was not enough provocation to justify a murder.

Petitioner affirms that the breach of peace statute is annually applied to at least five thousand citizens of the United States. This asseveration is flawed. The figures provided by the petitioner were obtained from an article published by the University of Puerto Rico Law Review.[23] These figures were in turn obtained from the Annual Reports of the Judicial Branch of Puerto Rico and refer to the numbers of cases pending during that fiscal year, not to the number of arrests made by the police. Furthermore, the statistics are extremely misleading since they refer to the three modalities of conduct proscribed under Section 260 of the Penal Code. These numbers may include the use of a firearm in a public street (subsection B) or disturbing the peace or quiet of a neighborhood, by loud and unusual voices, (Subsection A). Neither of these offenses has any relation with the constitutional rights under the First Amendment that the petitioner claims were violated. The figures cannot reveal the number of cases that arise from the use of the word "cabrón" or any other fighting word. For that reason those numbers should not be used to affirm that the breach of peace

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[22] *Id.* at page 513.

[23] R. Emmanuelli-Jiménez, *Análisis Constitucional del Delito de Alteración a la Paz- Articulo 260 del Código Penal de Puerto Rico,* (Constitutional Analysis of the Puerto Rico Breach of Peace Statute-Section 260 of the Puerto Rico Penal Code), 55 Rev. Jur. U.P.R. 587, 1987.

statute is widely applied in the Commonwealth of Puerto Rico.

The figures cited by petitioner for fiscal year 1989-90 refer to the number of cases pending during that year. But petitioner did not mention that during that year, of the 9,644 cases, 5,093 were dismissed; that the number of convictions was 1,809 of which 1,327 were by guilty pleas, and that 768 were acquitted. The high number of dismissals may be due in part to the fact that violations of Section 260 usually occur during emotional outbursts. The person files a complaint but later changes his mind and withdraws it. Another reason for the high number of dismissals could be the fact that, prior to the enactment of the Domestic Violence Act in 1989, Section 260 of the Penal Code was the usual legal vehicle to indict persons for such conduct. Domestic disputes disturb the peace and quiet of persons and neighborhoods by loud and unusual noises, insults, fights, threats and provocations. This conduct now mainly falls into the language of the Domestic Violence Act. The figures show that there has been a decline in the number of cases presented for violation of Section 260 of the Penal Code.[24]

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[24] According to the Annual Reports of the Judicial Branch of Puerto Rico the figures are as follows:

Fiscal Year	Total Cases	Convictions	Acquittals	Dismissals
1990-91	7,822	1,357	645	3,992
1991-92	7,536	1,387	649	3,846
1992-93	7,801	1,306	571	4,031
1993-94	7,902	1,368	628	4,229
1994-95	6,625	1,291	309	4,324

Petitioner, also, alleges that his conviction must be set aside because the instructions given to the jury were framed on the language of the breach-of-peace statute. Since he did not challenge the instructions during trial, he argues that the Commonwealth Supreme Court should have applied the doctrine established in *Stromberg v. California*, 283 U.S. 359(1931). Said doctrine is clearly inapplicable in the present case. In *Griffin v. United States*, 502 U.S. __, 116 L.ed 2d 371, 378 (1991), this Court, citing *Stromberg* asserted that:

> This language, and the holding of Stromberg, do not necessarily stand for anything more than the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground.

In the present case, petitioner was indicted for using a fighting word. The indictment clearly established that the word used by petitioner was "cabrón". The jury was instructed that section 260 of the Penal Code has three modalities, and that the charges brought against the petitioner related to one of these modalities. Then the trial judge read only subsection A of section 260.[25]

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[25] To determine the correctness or incorrectness of the instructions given to the jury , they should be considered as a whole, not in an isolated manner. *People v. Ortíz González, supra.*

The trial judge then warned the jury that in order to find the defendant guilty of violating section 260, where a word was used against a police officer, the evidence had to establish guilt beyond a reasonable doubt. Later the trial judge asked both the prosecution and the defense attorneys whether they wanted any additional instructions or if they wanted all of the subsections read. The answer to both requests was negative.

On appeal, the petitioner has challenged the constitutionality of the instructions given to the jury, alleging that the same should have included a reference to the effect that the insult or fighting word used by the defendant should have provoked a violent reaction. He also contented that the Handbook of Jury Instructions contained no instruction regarding the breach of peace offense.[26] After a brief analysis, both arguments were rejected by the Supreme Court, concluding that the instructions given to the jury substantially conform to law, and no fundamental rights of the appellant had been impaired.

The jury, given the instructions, had only two alternatives. If the jury found that the prosecutor had proven beyond a reasonable doubt that the defendant had called the police officer "cabrón" as he handed him the citation, then the verdict was guilty. If not, they had to acquit the

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[26] Section 260 of the Penal Code is classified as a misdemeanor. Article II, Section 11 of the Constitution of the Commonwealth of Puerto Rico established that: "In all prosecutions for a felony the accused shall have the right of trial by an impartial jury composed of twelve residents of the district, who may render their verdict by a majority vote which in no case may be less than nine".

defendant. Contrary to the *Terminiello v. Chicago*, *supra,* case, the petitioner never raised any constitutional question during trial. Only on appeal did he start to challenge the constitutionality of the statute. In the *Terminiello* case the defendant did not question the instructions given to the jury but challenged the constitutionality of the whole statute as construed and applied to him. In this case, defendant failed to do so.

In summary, it is most respectfully submitted that petitioner is not entitled as a matter of law to the remedy he seeks before this Court. Section 260 is not a legislative censorship upon certain types of expression. It is instead a penal statute that sanctions the use of certain words to disturb the peace of others. Even though the word "cabrón" is perhaps the worst insult that may be uttered to a Puerto Rican male, and its used as a fighting word is likely to provoke an immediate, violent reaction, the statute does not prohibit all use of that word. It only prohibits the act of disturbing the peace of another person by its use. In this case, the word was not used casually or as a literary resource, but was overtly directed to a police officer to offend him. The fact that the police officer controlled himself and did not react violently should not be used to excuse petitioner, and much less should be used to invalidate a statute which, as has been shown, restricts speech no more than strictly necessary to further the overriding state interest of preserving order and protecting people from affronts and attacks upon their reputation.

CONCLUSION

For the reasons stated in this brief, the petition for certiorari should be denied.

Respectfully Submitted,

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